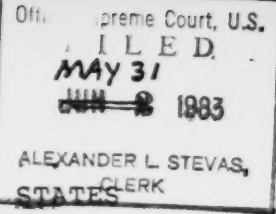


82 - 1949

NO. \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982



LOIS EVELYNE SHAFF,

Petitioner,

v.

UNITED STATES OF AMERICA, VERNE  
ORR, Secretary of the Air Force,  
and LUZ ZORAIDA VELANDIA SHAFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case presents questions of first impression under the Survivor Benefit Plan, 10 USC §§1447-1455 ("SBP"). Petitioner was the widow of a member of the Air Force who elected benefits for "wife and children" under SBP. The deceased member had named as his wife respondent Luz Zoraida Velandia Shaff ("Luz"), but his Dominican Republic "divorce" from petitioner was found to be invalid because of lack of domicile and lack of notice; thus the district court concluded petitioner was the surviving wife and eligible widow entitled to benefits. The of appeals agreed that petitioner was the member's lawful widow, but held that only the purported children of the member were entitled to SBP benefits. The children were not parties to the litigation nor had any claims been advanced on their behalf nor had the issues upon which the court of appeals based its decision been raised in

the district court or on appeal.

The questions presented to this Court are:

First, did the court of appeals err in denying SBP benefits to petitioner who was the legal eligible widow of a participating military retiree who had elected benefits for wife and children?

Second, did the court of appeals err in denying SBP benefits to petitioner based on issues never raised before the district court or on appeal and conferring such benefits on non-parties for whom no claim had been made?

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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LOIS EVELYNE SHAFF,

Petitioner,

v.

UNITED STATES OF AMERICA, VERNE  
ORR, Secretary of the Air Force,  
and LUZ ZORAIDA VELANDIA SHAFF,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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LOIS EVELYNE SHAFF petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A) is reported at 695 F. 2d 1138 (9th Cir. 1983). The opinion of the United States District

Court for the Northern District of California (Appendix C) is not reported.

2. JURISDICTION

A. The judgment of the Court of Appeals for the Ninth Circuit was filed and entered January 4, 1983.

B. The Order of the Court of Appeals denying a petition for rehearing was filed February 28, 1983.

C. Jurisdiction of this Court is based on 28 USC §1254(1).<sup>1/</sup>

3. STATUTES INVOLVED

This case involves the interpretation of the Survivor Benefit Plan (hereinafter "SBP"), 10 USC §§1447-1455, first enacted September 21, 1972 (Pub. L. 92-425, §1(3), 86 Stat. 706 et seq.). The provisions of SBP in effect during the pendency of this

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<sup>1/</sup> This petition is timely since the ninetieth day following denial of the petition for rehearing was May 29, 1983, a Sunday, followed by Memorial Day, May 30, 1983, a holiday. 28 USC §2101(c), Supreme Court Rules 20.4, 29.2.

litigation are set forth in Appendix E. The SBP has since been amended by the Uniformed Services Former Spouses' Protection Act enacted in October, 1982, effective February 1, 1983 (Pub. L. 97-252, Title X, 96 Stat. 730 et seq.). the new legislation, to the extent that it will be discussed herein, is included in Appendix F.

4. STATEMENT OF THE CASE

A. BASIS OF JURISDICTION IN THE  
DISTRICT COURT

Petitioner Lois Evelyne Shaff (plaintiff and appellee below) brought this action against the United States and the Secretary of the Air Force to declare her rights as the surviving widow of Donald E. Shaff, a deceased retired officer of the United States Air Force, to obtain money due her under the Survivor Benefit Plan, 10 USC

§§1447-1455 (hereafter "SBP"), and for an injunction prohibiting the Air Force from paying money or according any other benefits as surviving widow of Donald Shaff to any other person.<sup>2/</sup> Jurisdiction over the United States in the district court was based on 28 USC §1346(a)(2)(suit to recover money against the United States not exceeding \$10,000). Jurisdiction over the Secretary of the Air Force was based on 28 USC §1331 (suit arising under the laws of the United States where the amount in controversy was in excess of \$10,000), 28 USC §1361 (suit to compel officers of the United States to perform duties owed to plaintiff), 28 USC §2201 (suit for declaratory relief), and 5 USC

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<sup>2/</sup> The Administrator of Veterans Affairs was originally a party defendant against whom relief was sought. In response to a motion to dismiss the Administrator, plaintiff agreed that the case against the Administrator (cont'd on page 5)



§§701-706 (suit to review and compel agency action). Respondent Luz Zoraida Velandia Shaff (hereafter sometimes referred to as "Luz") was permitted to intervene below pursuant to Rule 24, Federal Rules of Civil Procedure and asserted jurisdiction under the same statutes in her complaint in intervention. Luz, a Colombian, claimed to have married Shaff in Colombia after he had obtained a "divorce" from petitioner in the Dominican Republic, thus claimed to be the eligible widow under SBP.

B. SUMMARY OF PROCEEDINGS BELOW

It was agreed by all parties in the district court that there was no genuine dispute as to the material facts in the case, thus the parties submitted the case on cross-motions for summary judgment

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<sup>2/</sup> was premature and could be dismissed without prejudice, and it was dismissed in the District Court's final judgment. (Appendix D).

based on official Air Force records and the declaration of petitioner. The government (respondents United States and Secretary of the Air Force) took no position as to which woman was entitled to benefits, but rather asserted it was acting as "stakeholder".<sup>3/</sup> The district court concluded that the "divorce" obtained by Donald Shaff was obtained without due process of law and was invalid as against public policy, since the "divorce" was obtained in the absence of domicile in the Dominican Republic and because the notice given was so insufficient as to amount to a denial of due process. Thus, the court concluded

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<sup>3/</sup> Petitioner had also claimed entitlement to benefits erroneously paid to Luz. The government contested that claim and the district court held that it had acted in good faith in making such payments, thus denied those benefits to petitioner. No appeal was taken from that decision by petitioner and the issue is not before this court.

that petitioner was the legal widow of Donald Shaff and, as such, was entitled to benefits under SBP. 10 USC §1448(b), 1450(a). (Appendix C). Summary judgment was entered in favor of petitioner and against Luz. (Appendix D). Luz appealed. The government did not.

On appeal, the Court of Appeals for the Ninth Circuit agreed that petitioner was the legal widow of Donald Shaff and affirmed the judgment against Luz. Nevertheless, the court reversed the judgment in favor of petitioner, finding that despite her status as legal widow of Donald Shaff, Shaff's election to participate in SBP was not intended to benefit petitioner. The court found that Shaff had the mistaken belief that Luz was his wife, thus his election to provide an annuity for his spouse was invalid since Luz was not entitled to benefits and therefore only that portion of the election to provide

benefits for children remained valid.

The purported children of Donald Shaff were not parties in the district court, nor was any action brought on their behalf. Moreover, the issue upon which the Court based its decision was never raised in the district court or on appeal by any party, thus petitioner never had any opportunity to brief the issue or to contest the legitimacy of any claim by any party other than Luz. Those issues were presented to the Court of Appeals in a petition for rehearing and for rehearing en banc but said petition was denied.

The present petition for certiorari seeks review of the decision of the Court of Appeals on the ground that its decision of an important question of federal law, interpretation of the SBP, was one of first impression, was wrong,

and should be resolved by this Court and that its decision resolving issues never litigated in favor of persons not parties to the litigation is in conflict with decisions of other Courts of Appeals and this Court and departs from the accepted and usual course of judicial proceedings. An examination of the undisputed facts, as established by the official records and petitioner's declaration is a predicate for presentation of petitioner's arguments and a concise statement of relevant facts follows.

C. STATEMENT OF RELEVANT FACTS

Petitioner Lois Evelyne Shaff and Donald E. Shaff then a lieutenant in the United States Air Force were married on June 17, 1947 in Kentucky. In 1953, Donald was assigned to Hamilton Air

Force Base and he and Lois moved to California where they remained together until November, 1967, except for the period of 1959-1962 when Donald was assigned to duty in Colombia. During these years the Shaffs lived together<sup>4/</sup> and in November, 1962 leased an apartment at 7555 Geary Boulevard, San Francisco, where they lived together continuously until November, 1967 and where Lois continuously lived thereafter to date. On March 31, 1964, Donald retired from the Air Force as a major in San Francisco and thereafter drew retirement pay, though he did not obtain employment and plaintiff continued to work as a legal secretary (as she still does) to support

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<sup>4/</sup> During the period 1959-1962, Lois spent time with her husband in Colombia and at their residence in California where she was employed as a legal secretary.

herself and her husband. On November 2, 1964, Donald Shaff left San Francisco, allegedly to visit his ailing mother in Rochester, New York. Lois never saw him again. From that time on, Lois diligently searched for her husband, but, though she was able to communicate with him by correspondence routed through his mother in Rochester, New York, she never discovered where he was until September, 1978 when she heard from Donald's brother that Donald had died. The last time Lois had heard from Donald was in 1974, when she received a letter postmarked February 26, 1974, Wichita, Kansas, which was addressed to her at her apartment at 7555 Geary Boulevard, San Francisco, and which contained the following cryptic message:

"This is to inform you that we

were divirced [sic] last year and you should file your income tax as a single person. No one in Rochester knows more than that.

Goodbye and Good Luck

/s/ D E Shaff."

Lois had no idea what Donald meant by his note since she never received any prior notice or information about any divorce proceedings, did not know where he was, and did not know how to find him. Indeed Lois was at all times required to and did file a joint tax return, never obtained a divorce herself or commenced any dissolution proceedings, though Donald refused to make his whereabouts known, and at all times considered herself Donald's wife, though, as indicated, after the letter of February, 1974, Lois never heard from Donald again. After Lois heard Donald had died, her lawyer, who had been trying to locate



Donald, tried to assert benefit claims to the Air Force on behalf of Lois, and it was then that an Air Force representative told Lois that Donald had obtained a "divorce" and had "remarried".

The Air Force records showed that Donald Shaff traveled to Colombia in November, 1967 and except for brief periods remained there until February, 1978. On March 2, 1973 he obtained a "divorce" from plaintiff in the Dominican Republic, alleging that he was a domiciliary of Colombia, giving "notice" of the divorce by publishing said notice in a newspaper, presumably Dominican, called "Ultima Hora". According to the records, Donald was physically present in Colombia at all times during the pendency of the "divorce proceedings". On April 5, 1973, Donald "married" Luz Velandia, respondent herein, in Colombia. Thereafter, on May 8, 1973,

Donald elected to participate in the Air Force SBP selecting an annuity for spouse and children, identifying Luz Velandia as his spouse. Donald died in the Batavia, New York Veterans Hospital on March 28, 1978 and Luz applied for and recieved survivor benefits as well as arrearages of retired pay in the sums of \$1,118.19 and \$829.96, respectively. Lois then applied for survivor benefits in October, 1978, whereupon payments to Luz were stopped and ultimately an opinion from the Comptroller General was sought as to the appropriate recipient of benefits. The Comptroller General determined that while the divorce obtained by Donald Shaff was of doubtful validity, sufficient uncertainty existed as to the marital status of the claimants so that neither claim could be allowed subject to a determination of

status by a court of competent jurisdiction and the parties were so notified.

Lois had never been in the Dominican Republic, never read or heard of "Ultima Hora", and never received any information or notice of the divorce proceedings.

After the Comptroller General's "decision," this action followed and as indicated, was resolved on cross-motions for summary judgment.

D. THE DECISIONS BELOW

The district court found and the Court of Appeals agreed that pursuant to 10 USC \$1450(a),<sup>5/</sup> SBP benefits could

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<sup>5/</sup> The complete statutory scheme of SBP is included in Appendix E. 10 USC \$1450(a) provides, in pertinent part:

(a) Effective as of the first day after the death of a [participating retiree] . . . a monthly annuity . . . shall be paid to --

(1) the eligible widow or widower;

(2) the surviving dependent children in equal (cont'd on page 16)

not be paid to an "outside beneficiary" if there was an eligible widow or surviving dependent children of a participating retiree. A widow is the "surviving wife" of such retiree as defined in 10 USC §1447(3). The courts below agreed that the definition of "wife" must be found in the law of the State of California, since the term is not defined in the SBP and since domestic relations are a matter of state law under Hisquierdo v. Hisquierdo, 439 US 572, 581 (1979) and In re Burrus, 136 US 586, 593-4 (1890).

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5/ (cont'd from page 15) shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;

(3) the dependent children in equal shares if the [participating serviceperson] . . . elected to provide an annuity for dependent children but not for the spouse; or

(4) the natural person designated . . . if there is no eligible beneficiary under clause (1) or (2)."

The courts found that the Dominican Republic "divorce" obtained by Donald was invalid since the Dominican Republic had no legitimate interest in the marital status of the parties, neither of whom were domiciliaries, residents, or had any other contacts with the Dominican Republic. Crouch v. Crouch, 28 Cd. 2d 243, 249(1946); see also Williams v. North Carolina, 325 US 226, 230(1945). Moreover, the "divorce" was invalid for another reason. Lois was denied notice, though Donald could have given her notice had he desired to do so. The publication of notice in a Dominican newspaper, to which, the district court observed "needless to say, Lois had no subscription", was so defective as to offend public policy, independently invalidating the divorce. Mullane v. Central Hanover Trust Co., 339 US 306, 314(1950); In

re La Opinion, 10 Cal. App. 3d 1012,  
1019, n.3(1970).

Accordingly since the divorce was invalid, the courts agreed that the marriage between Donald and Luz offended public policy as a bigamous marriage under Cal. Civ. Code §4401.<sup>6/</sup>

The district court then concluded that since Lois was the eligible widow of Donald Shaff, she was entitled to benefits under SBP. The Court of Appeals, on the other hand, agreed that Luz could

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<sup>6/</sup> Cal. Civ. Code §4401 provides in pertinent part:

"A subsequent marriage contracted by any person during the life of a former----wife of such person, with any person other than such former----wife, is illegal and void from the beginning, unless:

(1) The former marriage has been dissolved or declared a nullity prior to the date of the subsequent marriage.

The invalidity of such a marriage may be shown at any time. Parmann v. Parmann, 56 Cal. App. 2d 67, 69(1942).

not receive benefits, but then held that Shaff's purported children should get the benefits, not Lois. The court of appeals recognized that Luz had no standing to attack the judgment in favor of Lois against the government, but claimed it had jurisdiction to review that part of the judgment.

5. REASONS FOR GRANTING THE WRIT

The proper disposition of military retirement pay and military spousal benefits have been a recent concern of this Court and Congress, as evidenced by the decision of this Court in McCarty v. McCarty, 453 US 210(1981) and Congress' response thereto, i.e. the enactment of the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, Title X, 96 Stat. 730 et seq. (Appendix F). In this case, the court of appeals decided an important question of federal law

which has not been, but should be, settled by this Court, i.e. the rights of the widow of a retiree under SBP. It will be shown that the decision of the Court of Appeals was wrong and to allow the decision to remain standing will create great mischief in the administration of SBP and will deny the petitioner herein the benefits to which she should be entitled. Moreover, by deciding issues not raised before it or before the district court, and rendering a judgment in favor of non-parties, the court of Appeals departed from generally accepted rules of law and its decision is in conflict with decisions of this Court and other Courts of Appeals.

A. THE COURT OF APPEALS' DECISION  
DENYING PETITIONER BENEFITS UNDER SBP WAS  
CONTRARY TO LAW

There can be no question that for the



reasons stated by the district court and the Court of Appeals, the Dominican "divorce" obtained by Donald Shaff was invalid and petitioner Lois Evelyn Shaff was Donald's surviving wife and therefore his widow. See Section 4. D., supra.

As his widow, Lois would be entitled to benefits under SBP if her spouse elected to participate (or did not elect to opt out of participation). See 10 USC §1448(a)(2)(A) and compare with Pub. L. 92-425, §3(b), 86 Stat. 706, 711-712. In the present case, Donald elected benefits for his spouse and dependent children but named Luz as his spouse. The attempt to confer benefits upon Luz failed because under 10 USC §§1448(b), 1450(a)(4), no benefits could be conferred upon another if an eligible widow or dependent children existed. Under the recent amendments to SBP, Congress retained the same restriction on married members. Pub. L.

97-252, Title X, §1003(b),(c), amending 10 USC §§1448(b), 1450(a)(4). Contrary to the Court of Appeals' conclusion that election by Donald Shaff to provide benefits to "wife and children" was in the "mistaken belief that Luz was his spouse" (Appendix A, p. 90), there can be no doubt that Donald never intended to legitimately divorce Lois. As the district court found, Donald knew where Lois was (he wrote to her in 1974), thus his failure to advise her of his intentions in 1973 makes it clear that he "never intended to give Lois an opportunity to voice her objections to the divorce until it was a fait accompli". District Court opinion, Appendix C, p. 15. The reasons for that are obvious.

Prior to this Court's decision in McCarty v. McCarty, supra, in 1981, the established law in California, as in

other community property jurisdictions, was that military retirement pay was community property. In re Marriage of Fithian, 10 Cal. 3d 592(1974). By circumventing the notice requirements of due process and by hiding from Lois, Donald deprived her of any right she may have had to establish a right to a share of Donald's retirement pay. Under SBP, the retirement pay of a participating member is reduced by a certain percentage as his contribution to the Plan. 10 USC \$1452. Such contributions were thus the contributions not only of Donald Shaff, but were, under California law, those of petitioner Lois Evelyne Shaff as well. In re Marriage of Fithian, supra. The Congressional response to McCarty reinforces the view that at all times the financial contribution to establish the SBP benefit by Donald Shaff was derived from community funds. (McCarty was not

"retroactive." Wilson v. Wilson, 667 F. 2d 497, 498-9 (5th Cir. 1982)). Under Pub. L. 97-252, Title X, §1002(a), 96 Stat. 731, adding 10 USC §1408(c)(1)(appendix F, p.1), Congress has provided that local law prevails in determining the nature of retired pay. Under SBP, elections may provide ex-spouses with benefits in connection with judicial decrees even if there is a spouse and/or dependent children. Id., §1003, 96 Stat. 736, 737 (Appendix F, pp.2-9). Thus, while it is true that participation in SBP is voluntary, as pointed out in McCarty, supra, 227, there can be no doubt that the spouse has a stake in the matter, and such stake has been recognized by Congress. For example SBP requires that if a married retiree elects not to participate in the Plan at the maximum level, or elects to provide an annuity for dependent children but not the spouse,

the spouse shall be notified of such election. 10 USC §1448(a)(3). Congress further mandated that regulations be promulgated providing information of available elections to the member and his spouse. 10 USC §1455. While it is true that the SBP only requires notice and does not compel participation, McCarty, supra, 227, n.20, the only logical reason for requiring such notice must have been to permit a spouse threatened with deprivation of benefits to protect herself from the implications of such decision.

Barber By and Through Barber v. United States, 676 F.2d. 651 (Ct. Cl. 1982). In Barber, the Court of Claims recognized that a spouse would be "directly and adversely affected" by an election to deprive her of benefits and the failure to give notice thereof rendered invalid an election to opt out of SBP. 676 F.2d at 658. Before Donald Shaff could preclude his lawful wife from obtaining benefits under SBP, he had an obligation to see

that she was notified of his action. The significance of all this is to demonstrate the importance given by Congress to providing for the welfare of surviving spouses of members of the Armed Services. The McCarty court recognized this when it commented at 453 US 228:

"The SBP, which was referred to as the 'widow's equity bill,' - - - was enacted because of Congress' concern over the number of widows left without support through low participation in the RSFPP - - -."

Furthermore, elections under SPB are generally irrevocable. See McCarty, supra, 227, n. 20; 10 USC §§1448(a)(4), (5), 1450(g). Thus, if a member elected to cover his spouse under SBP such election could not be revoked, regardless of his later intent or changed circumstances. In the present case, Donald Shaff elected spousal coverage. Regardless of his intent to cover a stranger, he could not revoke his election and

the court should not and cannot do it for him.

The Court of Claims has held that despite a member's intent, the determinative issue is whether a valid irrevocable election to provide benefits under SBP has been made. MacConnell v. United States, 217 Ct. Cl. 33(1978). In MacConnell, the member, unmarried at the time, stated he might marry again and "elected" to provide spousal benefits under SBP if he did remarry. Shortly before his death, the member remarried but never filed a subsequent election. The Court did not doubt his intent, but held that when he purported to provide benefits he could not and when he could he did not. Thus, benefits were denied due to a lack of valid election. 217 C. Cl. at 38.

In the present case, the member not only could, but did, elect benefits for his spouse. He had a legal wife and when he died he left a legal widow, petitioner Lois

Evelyn Shaff. He elected benefits for spouse and children, thus 10 USC §1450(a)(3) (election for children but not for spouse) was inapplicable and the only way any surviving children could receive benefits would be on the death or ineligibility under Section 1450 of the widow, Lois. 10 USC §1450(a)(2). Lois has not become ineligible under Section 1450, is the widow of Donald Shaff, and therefore is the only person presently entitled to benefits under SBP.<sup>7/</sup>

It is not unusual either in State or federal practice in the area of probate and family law to reach results based on actual legal relationships rather than intent. Estate of Long, 198 Cal. App. 2d 732, 738(1961) (attempt to deprive legal widow of property by "putative" spouse); MacConnell v. United States, supra.

<sup>7/</sup> The district court recognized that at some point the surviving children of Donald Shaff could obtain benefits under 10 USC §1450(a)(2). Appendix C, p.20.



In this case, the decision of the Court of Appeals cannot be justified in law or fact. To carry the decision to its logical extreme, if Shaff elected benefits for wife only, intending Luz to obtain spousal benefits, under the court's decision, if Shaff's intent prevailed, since Luz was ineligible because Lois was Shaff's widow, no one would get any benefits. Such a result would totally frustrate the statutory scheme, as does the present decision.

In sum, Lois was the widow of Donald Shaff. Shaff elected SBP coverage for wife and children. It is conceded that he intended Luz to receive the benefits, but she could not because she was not his wife. Lois was. Under SBP, Shaff's election was irrevocable. Lois is entitled to the benefits due to her as a result of her status.

B. THE COURT OF APPEALS IMPROPERLY  
CONSIDERED ISSUES NOT RAISED BY ANY  
PARTY AND RENDERED JUDGMENT IN FAVOR OF  
NON-PARTIES

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The only claims made by plaintiff in intervention were that she was the widow of Donald Shaff therefore entitled to SBP benefits under 10 USC §1450(a)(1) or that she was entitled to benefits regardless of status under 10 USC §1450(a)(4). On appeal she also claimed rights as a "putative spouse", though that issue was never raised in the district court. At no time did she or any other party claim that Donald Shaff's intent controlled and that though Luz was not entitled to SBP benefits, neither was Lois. The alleged children of Donald Shaff were never parties below.

The Court of Appeals recognized that the only appeal taken in the present

case was by Luz, not by the government. Appendix A, p. 5, n.1, pp. 11-12. The court then stated that nevertheless it was entitled to review the judgment in favor of Lois because to do otherwise would "permit an unjust result". It placed its authority for such review on cases such as Moitie v. Federated Department Stores, Inc., 611 F. 2d 1267 (9 Cir. 1980)<sup>8/</sup>, Kicklighter v. Nails by Jannee, Inc., 616 F. 2d 734 (5 Cir. 1980), Bryant v. Technical Research Co., 654 F. 2d 1337 (9 Cir. 1981), and Estate of McDill, 14 C. 3d 831 (1975). But the Court overlooked the fact that unlike Kicklighter, Bryant, and McDill which permitted appeals to resolve issues affecting rights of non-appealing parties, the parties who are affected by the present

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<sup>8/</sup> Which the court claimed was reversed "on other grounds", 452 U.S. 394 (1981).

decision were never before the Court, i.e. the purported "children" of Donald Shaff. Moreover, in Moitie, this Court did not reverse "on other grounds", but, rather, reversed the decision of the Court of Appeals for the Ninth Circuit, on point. With respect to the contention that "justice" required review, the Supreme Court in Moitie observed that:

"The Court of Appeals also rested its opinion in part on what it viewed as 'simple justice'. But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simply justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata'. Heiser v. Woodruff, 327 U.S. 726, 733 (1946). The Court of Appeals' reliance on 'public policy' is similarly misplaced. This

Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties'. Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931)."

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401(1981).

The observations of Justice Blackmun, joined by Justice Marshall, concurring in the Supreme Court's decision in Moitie, distinguishing Estate of McDill, (a case relied on by the Court of Appeals in this case) is also instructive. Justice Blackmun pointed out that the Court of Appeals' reliance on McDill was misplaced in that, unlike McDill, Moitie was not a case where the appealing and nonappealing parties made competing claims to a single property.

As noted in the present case, there were no parties competing with Lois

except Luz. Since the "children" were never parties, they had no standing to appeal and could not be the beneficiaries of any other appeal. In Bryant v. Technical Research Co., supra, 1343, the Court of Appeals for the Ninth Circuit held:

"To have standing to appeal a party must be 'aggrieved by the District Court order.' --- A party may only appeal to protect 'its own interests', not those of any other party."

Thus, not even the government had any standing to appeal and its presence as a "party" (actually a self-professed stakeholder), created no right of review of a decision allegedly affecting non-parties. Anthony v. Petroleum Helicopter, Inc., 693 F 2d 495, 497 (5 Cir. 1982); and compare Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944). To have standing to appeal, a person must be a party at the time a judgment is entered

and must be aggrieved by the decision from which appeal is taken. Hoover v. Switlik Parachute Co., 663 F. 2d 964, 966 (9th Cir. 1981); Union of Prof. Airmen v. Alaska Aeronautical, 625 F. 2d 881, 884 (9th Cir. 1980).

Moreover, since no right to children's benefits was ever asserted in the district court, Lois was never called upon to dispute either their status or their rights.<sup>9/</sup> While the administrative record lends some support to the existence of the children, their status simply never was an issue. If the issue could have been raised by Luz, the failure to do so resulted in its being abandoned. Earman Oil Co., Inc. v. Burroughs Corp., 625 F. 2d 1291, 1294, n. 10 (5th Cir. 1980).

Moreover, the manner in which the Court of Appeals decided the case precluded

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<sup>9/</sup> Indeed one purported child is over 18 and may not be entitled to benefits at all. 10 USC §1447(5)(B).

petitioner herein from presenting any of the legal or factual arguments raised in Part 5A of this Petition. Lois was called upon to litigate only the issues referred to hereinabove, i.e. whether she or Luz was the widow of Donald Shaff or whether Luz could obtain benefits under SBP pursuant to USC §1450(a)(4), even if Lois was Donald's widow.

Even if Luz had standing to raise issues pertaining to her alleged children's rights, she did not. The Court of Appeals should therefore not have decided the matter.

In Singleton v. Wulff, 428 US 106, 120-121 (1976), this Court stated:

"It is the general rule, of course, that a federal appellate court does not consider an issue not passes upon below. In Hormel v. Helvering, 312 US 552, 556,--- (1941), the Court explained that this is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to



introduce evidence. We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he was justified in not presenting those arguments to the Court of Appeals.--- The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard."

In exceptional cases, of course, this Court has indicated that a case might be appropriately remanded to the district court for a determination of issues not previously raised below. Youakim v. Miller, 425 US 231 (1976); see also Connoly v. Pension Benefit Guar. Corp., 581 F. 2d 729, 734-735 (9th Cir. 1978), cert. den. 440 US 935 (1979).

While petitioner believes that the decision of the Court of Appeals should be reversed, as contrary to law, at the very

least, petitioner should have an opportunity to litigate the legal and factual questions raised by the court's decision, and in this petition, in the district court, i.e. status of the "children" of Donald, petitioner's entitlement to notice, petitioner's claims based on community property rights, and petitioner's entitlement to benefits regardless of Donald Shaff's intent.

The Court of Appeals stated that it reviewed the case despite the absence of appealing parties to avoid an "unjust result." But, is it just that the legal widow of a military officer, abandoned without remorse after 20 years of marriage, purportedly "divorced" without notice six years later, deprived of her share of her husband's retirement pay, be denied benefits, paid for in part with community funds, after a contested adversary proceeding as a result of a decision based on the resolution of

issues with which petitioner was never confronted and never had an opportunity to contest?

The apparent sympathy of the Court of Appeals for the purported "children" of Donald Shaff resulted in a departure from the usual standards governing litigation. A "just result," like "simple justice," would have been better achieved if the court below had refrained from deciding this case based on its own "ad hoc determination of the equities," compare Moitie, supra 452 US at 401, and had limited its decision to the issues and parties before it.

6. CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 31, 1983

JERRY K. CIMMET  
Civic Center Building  
507 Polk Street, Suite 250  
San Francisco, California 94102

Counsel of Record for Petitioner  
LOIS EVELYNE SHAFF

82-1949

Office-Supreme Court, U.S.

FILED

JUN 2 1983

ALEXANDER L. STEVAS,  
CLERK

NO. \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

\_\_\_\_\_  
\_\_\_\_\_  
LOIS EVELYNE SHAFF,

Petitioner,

v.

UNITED STATES OF AMERICA, VERNE  
ORR, Secretary of the Air Force,  
and LUZ ZORAIDA VELANDIA SHAFF,

Respondents.  
\_\_\_\_\_  
\_\_\_\_\_

APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
\_\_\_\_\_  
\_\_\_\_\_

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Counsel of Record for Petitioner  
LOIS EVELYNE SHAFF

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APPENDIX A

OPINION OF THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT  
(January 4, 1983)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOIS EVELYNE SHAFF,	)	FILED
	)	JAN 4 1983
Plaintiff,	)	PHILLIP B.
	)	WINBERRY
vs.	)	Clerk, U.S.
	)	COURT OF
UNITED STATES OF AMERICA; DR.	)	APPEALS
MARK HANS, Secretary of the	)	
Air Force; and MAX CLEAND,	)	No. 82-4041
Administrator of Veterans	)	
Affairs,	)	
	)	
Defendant.	)	D.C. No. C-
	)	80-0977 RPA

LUZ ZORAIDA VELANDIA SHAFF,	)	
	)	
Plaintiff-in Intervention-	)	
Appellant,	)	<u>OPINION</u>
	)	
vs.	)	
	)	
LOIS EVELYNE SHAFF, UNITED	)	
STATES OF AMERICA; DR. MARK	)	
HANS, Secretary of the Air	)	
Force; and MAX CLEAND, Admi-	)	
nistrator of Veteran Affairs,	)	
	)	
Defendants-in-Interven-	)	
tion-Appellees.	)	

Appeal from the United States  
District Court  
for the Northern District  
of California  
Robert P. Aguilar  
District Judge, Presiding  
Argued and Submitted September 16, 1982

Before: Wallace, Kennedy and Nelson,  
Circuit Judges

NELSON, Circuit Judge:

This case concerns a dispute between two women, Lois Shaff and Luz Shaff, each of whom claims to be the proper beneficiary of an annuity under the military Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455 (SBP). SBP provides annuity benefits to designated survivors upon the death of a participating military retiree. The District Court found Lois Shaff, the deceased retiree's first wife, to be the "eligible widow" entitled to the annuity under 10 U.S.C. §1450(a)(1). Accordingly, the District Court granted summary judgment in favor of Lois Shaff and against Luz Shaff, the retiree's second wife. We agree that Lois Shaff is Major Shaff's legal widow, but for the reasons set forth below, we reverse the summary judgment in her favor and remand.



## I. FACTS

Major Donald Shaff married Lois Shaff in 1947. In 1953, Donald and Lois moved to California, where Lois still lives. From 1959-1962, Shaff was stationed in Colombia, where he lived without Lois except for occasional visits.

Major Shaff met Luz Zoraida Velandia while in Colombia, and had a child by her in December 1962. Major Shaff returned to live with Lois in California in 1962, and retired from the Air Force in 1964. In 1967, Major Shaff went back to Luz in Colombia. He never saw nor spoke to Lois again, and kept his whereabouts secret from her the rest of his life.

In March 1973, Major Shaff obtained an ex parte divorce from Lois in the Dominican Republic. Notice of the divorce was published only in a Dominican newspaper. Lois first learned of the divorce in a cryptic letter from Major Shaff in

1974.

Major Shaff married Luz Shaff one month after the divorce in 1973. One month after that, he elected to participate in the SBP, naming as beneficiaries his "wife and children." On the election certificate, Major Shaff identified his wife as Luz Shaff. Major Shaff's children are Donald, Jr., born 1962, and Leo, born 1974. He had no children by Lois.

Major Shaff died in 1978. Luz claimed benefits under the SBP. Donald, Jr., and Leo were named on the claim application form. The Air Force paid annuity benefits to Luz under the SBP until Lois made a claim for benefits as Shaff's lawful widow. Payments have been suspended pending the resolution of this dispute.

## II. PROCEDURAL BACKGROUND

Lois sued to compel the Air Force to pay the annuity benefits to her as Major Shaff's legal widow. Luz intervened. On

cross-motions for summary judgment, the District Court found that Lois was Major Shaff's lawful widow and entitled to the annuity benefits under the SBP. The court denied Luz's motion for summary judgment, and granted summary judgment to Lois and the Federal parties as defendants-in-intervention and dismissed Luz's complaint-in-intervention. The court granted summary judgment in favor of Lois as plaintiff and against the Federal parties as defendants. Luz appeals.1/

### III. ISSUES AND STANDARD OF REVIEW

The issues in this case are:

1. Whether the District Court was clearly erroneous in concluding that Lois is Major Shaff's legal widow; and

2. Who is entitled to the annuity benefit.

Because this is an appeal from a summary judgment, we engage in an independent review to determine whether summary judgment is proper. Gaines v. Haughton,

645 F.2d 761, 769 (9th Cir. 1981). However, we accept on review the District Court's interpretation of the state family law unless it is clearly erroneous. Id. at 770.

#### IV. DISCUSSION

Under the SBP, annuity benefits are paid to the survivors of a participating military retiree pursuant to 10 U.S.C. §1450, which provides:

(a) Effective as of the first day after the death of a [participating retiree] . . . a monthly annuity . . . shall be paid to--

(1) the eligible widow or widower;

(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;

(3) the dependent children in equal shares if the [participating serviceperson] . . . elected to provide an annuity for dependent children but not for the spouse; or

(4) the natural person designated . . . if there is no eligible beneficiary under clause (1) or (2).

In order to be entitled to the

annuity, Luz must qualify as an "eligible widow." 10 U.S.C. §1450(a)(1). The statute defines the term "widow" to mean the "surviving wife" of the retiree, 10 U.S.C. §1447(3), but does not define "wife." That definition must be found in the state family law, since domestic relations are a matter of state law. See Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1, 10-11 (1979).

The District Court found that California law would not recognize Major Shaff's Dominican Republic divorce, and therefore that Major Shaff's marriage to Luz would be illegal and void as a bigamous subsequent marriage under California Civil Code §4401. The District Court reasoned that the divorce would be invalid in California as against public policy because:

- 1) Lois had no notice of the proceedings,

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed.

§65, 873 (1950), In re La Opinion, 10 Cal. App. 3d 1012, 1019 n.3, 89 Cal. Rptr 404, 409 n.3 (1970); and 2) the Dominican Republic had no legitimate interest in the marriage since neither Donald nor Lois resided there, Crouch v. Crouch, 28 Cal. 2d 243, 249, 169 P.2d 897 (1946). The District Court was not clearly erroneous in its application of the California family law, and we accept its conclusion that Lois, not Luz, is Major Shaff's legal widow. Accordingly, we affirm the District Court's summary judgment against Luz.

However, we cannot agree with the District Court that Lois is entitled to the annuity. For existing retirees as of 1972, the SBP is a voluntary plan, in which existing retirees must affirmatively elect to participate. 2/ Act of September 21, 1972, Pub. L. No. 92-425 §3(b), 86 Stat. 706, 711-712, as amended by Department of Defense Appropriation Authorization Act of 1974,

Pub. L. No. 93-155, Title VIII §804, 87 Stat. 605, 615 (1973); Dept. of Defense Directive No. 1332.27, §§601(a), 601(b) (1974). Under the SBP, a portion of the participant's retired pay is deducted to provide an annuity to survivors after the retiree's death. A participating retiree may designate as beneficiary either the spouse, the spouse and children, or the children only.<sup>3/</sup>

In this case, while Major Shaff elected to participate, it is clear that his election was based on a desire to provide the annuity for Luz and their children. He elected to participate in the SBP one month after marrying Luz, and identified her on the election certificate as his spouse. Major Shaff did not elect to participate for Lois's benefit. He elected to provide benefits to his "wife and children" in the mistaken belief that Luz was his spouse.

Since the election was voluntary, we find that the mistake invalidates Major Shaff's election to provide an annuity for his spouse. Accordingly, Lois is not entitled to the annuity, and the summary judgment in her favor is reversed. Furthermore, the surviving dependent children become the sole designated beneficiaries; the annuity should be paid under 10 U.S.C. 1450(a)(3). We therefore remand the case for appropriate proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.



## FOOTNOTES

1. The Federal Defendants did not appeal the summary judgment against them in favor of Lois. No disposition of this appeal could adversely affect their interests since their position is analogous to that of an interpleader. The summary judgment between Lois and the Air Force does not directly affect Luz's interest because we affirm summary judgment against Luz as intervenor; as a general rule, Luz as intervenor would not have standing to appeal that part of the judgment because it does not affect her interests. 7A C. Wright and A. Miller, Federal Practice and Procedure §1923, at 632-33 (1972); See Boston Tow Boat Co. v. United States, 321 U.S. 632, 64 S. Ct. 776, 88 L. Ed. 975 (1944); Smuck v. Hobson, 408 F.2d 175 (5th Cir. 1969) cited in Spangler v. Pasadena City Board of Education, 427 F.2d 1352 (9th Cir. 1970). Nonetheless, we have jurisdiction to review

that part of the judgment, because the part of the judgment from which Luz is entitled to appeal is so closely interwoven with the summary judgment between Lois and the Air Force that its consideration is necessary to determine Luz's rights. See Moitie v. Federated Department Stores, Inc., 611 F.2d 1267 (9th Cir. 1980), rev'd on other grounds 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); see also Kicklighter v. Nails by Jannee, Inc., 616 F. 2d 734 (5th Cir. 1980), and In re Estate of McDill, 14 Cal. 3d 831, 840, 122 Cal. Rptr. 754, 759 (1975). To do otherwise would be to favor form at the expense of substance, Bryant v. Technical Research Co., 654 F.2d 1337 (9th Cir. 1981), and permit an unjust result in this case.

2. For those retirees initially entitled to retired pay-on or after September 21, 1972, participation in the plan is automatic, unless the person elects not to parti-

cipate. 10 U.S.C. §1448(a)(2)(A).

3. An unmarried retiree who has no dependent children may designate as a beneficiary a natural person with an insurable interest in the retiree, 10 U.S.C. §1448 (b), but that beneficiary will only be paid the annuity if there is no eligible spouse or child upon the retiree's death. 10 U.S.C. §1450(a)(4).

APPENDIX B

ORDER OF THE COURT OF APPEALS DENYING  
PETITION FOR REHEARING (February 28,  
1983)

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LOIS EVELYNE SHAFF,	)	FILED
	)	FEB 28 1983
Plaintiff,	)	PHILLIP B.
	)	WINBERRY
v.	)	Clerk, U.S.
	)	COURT OF
UNITED STATES OF AMERICA,	)	APPEALS
et al.,	)	
	)	No. 82-4041
Defendants.	)	
	)	D.C. No. CV-
LUZ ZORAIDA VELANDIA SHAFF,	)	80-977
	)	
Plaintiff in Intervention-Appellant,	)	N.D. California
	)	
v.	)	
	)	ORDER
LOIS EVELYNE SHAFF, et al.,	)	
	)	
Defendants in Intervention-Appellees.	)	
	)	

---

Before: WALLACE, KENNEDY, and NELSON,  
Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and

no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA (October 30, 1981)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LOIS EVELYNE SHAFF,	)	FILED
	)	OCT 30 1981
Plaintiff,	)	WILLIAM L.
	)	WHITTAKER
vs.	)	Clerk, U.S.
	)	DISTRICT COURT
UNITED STATES OF AMERICA,	)	NORTHERN DIS-
et al.,	)	TRICT OF CA-
	)	LIFORNIA
Defendants.	)	
<hr/>		
LUZ ZORAIDA VELANDIA SHAFF,	)	No. C-80-
	)	977 RPA
Plaintiff in	)	
Intervention,	)	<u>OPINION</u>
	)	
vs.	)	
	)	
LOIS EVELYNE SHAFF, et al.,	)	
	)	
Defendants in	)	
Intervention.	)	
<hr/>		

There is no genuine dispute as to the material facts of this case. Major Donald E. Shaff [hereinafter "Donald" or "Major Shaff"] retired from the United States Air Force on March 31, 1964. In 1967 he left his wife, Lois Evelyn Shaff [hereinafter "Lois"], to whom he had been married

ENTERED IN CIVIL DOCKET Nov. 2, 1981



since 1947, and moved to Bogota, Columbia without informing her as to his whereabouts. During his residence in Columbia, on March 2, 1973, Major Shaff obtained an ex parte divorce from Lois in San Cristobal, Dominican Republic. Constructive service of the divorce proceedings on Lois was effected through publication in a Dominican newspaper, the "Ultima Hora." Major Shaff was in Bogota at the time of the divorce proceedings. On April 5, 1973, he married a Columbian citizen, Luz Zoraida Velandia [hereinafter "Luz"], in a ceremony in Bogota.

Pursuant to 10 U.S.C. §1447, et seq., Major Shaff chose to participate in the Survivor Benefit Plan of the Armed Forces [hereinafter "SBP"] on May 8, 1973, and elected coverage for "My spouse and children," naming Luz and his son by Luz, Donald Eduardo, as beneficiaries. Major Shaff

returned to the United States in early 1978 for medical purposes and died at the Veteran's Administration Hospital in Batavia, New York, on March 28, 1978.

Luz applied for and received arrearages of Air Force retired pay in the amount of \$1,118.19. Luz also applied for and began to receive benefits under the SBP. At the time of Luz' application, Major Shaff's Air Force file contained no suggestion that Lois was or had been his wife. In October 1978, Lois, who had not known her husband's whereabouts since his departure in 1967, finally learned of his remarriage to Luz and of his subsequent death. Lois also applied for survivor benefits in October 1978, whereupon payments to Luz were stopped pending a resolution of the dispute. Luz had received \$829.96 under the SBP prior to that time.

The Air Force requested instruction regarding the conflicting claims from the

office of the Comptroller General of the United States. On January 23, 1980, the Comptroller General's office filed its decision on the matter, declining to determine which of the claimants was the rightful widow of Major Shaff and referring the parties to a court of competent jurisdiction. This action followed. All parties have filed cross-motions for summary judgment.

The Survivor Benefit Plan, 10 U.S.C. §1447 et seq., is a voluntary program enacted by Congress in 1972 to enable military retirees to continue supporting certain spouses, dependent children, and others beyond the retiree's date of death. Since portions of the retiree's retired pay are deducted in order to provide the coverage selected, SBP is a contractual, partially self-financed plan. 10 U.S.C. §1450(a), providing for the payment of annuities, states:

Effective as of the first day after the death of a person to whom section 1448 of this title applies..., a monthly annuity under section 1451 of this title shall be paid to--

- (1) the eligible widow or widower;
- (2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;
- (3) the dependent children in equal shares if the person to whom section 1448 of this title applies elected to provide an annuity for dependent children but not for the spouse; or
- (4) the natural person designated under section 1448(b) of this title...if there is no eligible beneficiary under clause (1) or (2).

It is clear from the language of the statute that no outside beneficiary may be designated if there is either an eligible widow or surviving dependent children as defined by the statute. Thus, the fact that Luz was named as Donald's "wife" on his SBP application is not controlling if she is not in fact the "eligible widow" under 10 U.S.C. §1450(a)(1).

10 U.S.C. §1447(3) provides:

"Widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay--

- (A) was married to him for at least one year immediately before his death; or
- (B) is the mother of issue by that marriage.

No definition of the term "wife" is provided by the statute. Nor could federal law otherwise provide such a definition, for, as federal courts have long recognized, "[t]he whole subject of the domestic relations of husband and wife ... belongs to the laws of the States and not to the laws of the United States." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979), quoting In re Burrus, 136 U.S. 586, 593-94 (1890). Questions bearing on family property and the protection of married women involve "intensely local interests," United States v. Yazell, 382 U.S. 341, 349 (1966), and therefore devolve to State regulations. The Court thus turns to California law for the de-

termination of the identity of Major Shaff's legitimate wife.

The validity of the marriage of Donald and Lois in 1947 in Kentucky is not challenged here and is recognized as valid under California law since it is valid in Kentucky. Cal. Civ. Code §4104. Donald's marriage to Luz, however, is equally valid since it is valid under Columbian law, "unless it collides with some strong public policy of the state of residence." Barrons v. United States, 191 F.2d 92, 95 (9th Cir. 1951); cf. Restatement of Conflicts of Laws 2d §283. Thus, in the absence of some strong public policy of the State of California, both marriages are valid, since they are valid under the laws of the jurisdiction where they were entered into.

A public policy against recognizing the validity of both marriages is readily found in the provisions of Cal. Civ. Code

§4401, which states:

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

- (1) The former marriage has been dissolved or declared a nullity prior to the date of the subsequent marriage.

...

The strong public policies for the protection of spouses and against bigamy are inherent in the statute. So greatly do multiple marriages impinge on these important interests that

as a matter of public policy the court should, at the first opportunity, enter its decree annulling such a marriage, to the end that the public be protected so far as possible from the evils of such unlawful acts and to prevent the innocent from suffering therefrom.

Sullivan v. Sullivan, 219 Cal. 734, 736 (1934). Furthermore, the invalidity of such marriages may be shown at any time. Parmann v. Parmann, 56 Cal. App. 2d 67,

69 (1942).

Therefore, whether Donald's second marriage to Luz is void depends on the relatively simple question whether the ex parte Dominican Republic divorce is valid and whether therefore the marriage of Donald and Lois was legally dissolved. If the divorce was valid, the requirements of Cal. Civ. Code §4401 are met and Luz is the "eligible widow" under 10 U.S.C. §1450(a). If the divorce was invalid, Lois is the eligible widow.

Nothing in the record of this case suggests that the divorce undertaken in San Cristobal, Dominican Republic on March 2, 1973, was not valid under Dominican law. As a general rule, American courts recognize the validity of the laws and judgments of foreign jurisdictions under the doctrine of comity. 47 Am. Jr. 2d 222; Restatement of Foreign Relations Law 2d §41. The doctrine of comity is recognized



under California law. Blythe v. Ayres, 96 Cal. 532, 561 (1892). the doctrine, however, is not without its limits. Courts "will never give effect to a foreign law when to do so would prejudice the state's own rights or the rights of its citizens, or when the enforcement of the foreign law would contravene the positive policy of the law of the forum ..." Thome v. Macken, 58 Cal. App. 2d 76, 79 (1943). Thus,

[the] rule of comity is subject to the principle that foreign laws will not be given effect when contrary to the settled public policy of the forum, but that it must be clear that the enforcement of the right obtained under the laws of another state would be prejudicial to recognized standards of morality and to the general interest of the citizens in the state of the forum.

Id. at 118, explaining Biewend v. Biewend, 17 Cal. 2d 108 (1941). The standard for refusing to recognize the divorce decree of a foreign nation is lower than that which must be accorded to sister states under the Full Faith and Credit Clause of

the Constitution (Art. IV, §1).

[U]nder the comity -- as contrasted with full faith and credit -- our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons, despite whatever allegations of jurisdiction may appear on the face of such foreign judgments.

Rosenbaum v. Rosenbaum, 309 N.Y. 371, 375 (1955), quoted with approval in Montemurro v. Immigration and Naturalization Service, 409 F.2d 832, 833 (9th Cir. 1969). Thus, if recognition of the Dominican divorce decree would clearly prejudice the rights of Lois or offend the public policy of the State of California or of the United States, this Court must deny the validity of the decree.

The Court finds that the Dominican divorce decree wholly fails to protect the interests of Lois and offends the public policy of this forum in two ways. First, the forum in which the decree was issued, the Dominican Republic, had no

legitimate interest in the marital status of Donald and Lois, since neither of them resided there.

It is a well established rule that jurisdiction to grant a divorce rests upon bona fide domicil. Where neither party is domiciled within the state, no divorce can validly be granted and all proceedings, as well as the judgment, are void. Stated another way, a decree of divorce rendered in one state may be impeached and denied recognition in another upon the ground that neither of the parties had domicil at the divorce forum, and this is true notwithstanding the recital in the decree from the other state of the jurisdictional fact of domicil or residence.

Crouch v. Crouch, 28 Cal. 2d 243, 249 (1946).

Jurisdiction of the divorce forum based on domicil has repeatedly been required by California courts, see, e.g., Sohnleir v. Winchell, 230 Cal. App. 2d 508, 511 (1964), Aldabe v. Aldabe, 209 Cal. App. 2d 453, 464 (1962), as indeed it has been required by all courts in the English-speaking world. Williams v. North Carolina, 325 U.S. 226, 230 (1945). As stated by Justice Frank-

furter in Williams, supra, "Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." Id. Although this rule in its absolute form has occasionally been criticized, see concurring opinion of Justice Traynor in Scott v. Scott, 51 Cal. 2d 249, 254-55, cf. Restatement of Conflict of Laws 2d §72., all authorities agree that the divorce forum must possess an identifiable legitimate interest in the marital status of the parties.

The Dominican Republic has no such interest in the marital status of Donald and Lois, whether grounded in domicil or otherwise. The divorce decree itself lists Bogota, Columbia as the domicil of Donald. As stated above, it appears that Donald never even traveled to San Cristobal to take part in the proceedings. None of the parties had contacts with the Dominican

Republic which in any way could confer a legitimate interest on the part of the Republic in their marital status. On this ground alone this Court would be justified in invalidating the divorce decree.

There is, however, an additional reason for refusing to recognize the decree's validity. Lois at no time received notice of the pending divorce proceedings, although Donald could easily have provided her with such notice had he chosen to do so. A long line of United States Supreme Court cases has recognized the necessity of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950); and see Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. Hutchinson City, 352 U.S. 112 (1956). Ca-

lifornia courts have recognized that published notice alone is inadequate where some method of actual notice is feasible. In re La Opinion, 10 Cal. App. 3d 1012, 1019, fn. 3 (1970).

Constructive notice, apparently sufficient under Dominican law, was effected by publication in the Dominican paper "La Ultima Hora," to which, needless to say, Lois had no subscription. Lois has lived continuously at the same address from the time that Donald departed in 1967 until the present. The fact that Donald was aware of Lois' location is clearly shown by a letter he wrote to her at that address in 1974 informing her (in two sentences) of their "divorce" the preceding year. These facts make abundantly clear that Donald never intended to give Lois an opportunity to voice her objections to the divorce until it was a fait accompli. Although Dominican courts are of course

not bound by the notice requirements bound up in the Due Process Clause of the United States Constitution, the notice given Lois here is so defective as to seriously prejudice her interests and to offend the public policy of this forum. Thus, under the principles of comity discussed above, the divorce decree is not entitled to recognition by this Court.

Since the Dominican divorce is invalid, pursuant to Cal. Civ. Code §4401, Lois is the legitimate widow of Major Donald Shaff. Lois is therefore the party entitled to benefits under 10 U.S.C. §1450(a). Two matters remain to be resolved, however.

The first is the question of whether Lois is entitled to recover from the Air Force those payments already made by the Air Force to Luz before becoming aware of Lois' claim to the same benefits. Since the statutes do not indicate otherwise,

review of the payments made by the Air Force is conducted under the standards contained in the Administrative Procedure Act. 5 U.S.C. §706 provides in relevant part:

The reviewing court shall ... (2) hold unlawful and set aside agency action, findings, and conclusions found to be --

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... [or]
- (F) unwarranted by the facts ...

The United States Supreme Court has stated:

Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Bowman Transportation v. Arkansas-Best

Freight System, 419 U.S. 281, 285 (1974)

(citation and some punctuation omitted for clarity). Under this standard it is im-



possible to conclude either that the Air Force did not consider the relevant factors in making the payments or that its judgment in doing so was clearly in error. On the contrary, a review of the Air Force file on Major Shaff at the time of his death indicates no suggestion that Lois Shaff had ever been Donald's wife. Rather, the information contained in that file shows that Luz had been named by Major Shaff as his "wife" some five years prior to his death. The Air Force was justified in relying on the uncontradicted claim of Luz to benefits payable to the widow of Donald Shaff. the record shows that the Air Force immediately withheld further payments to Luz at the time that it received the conflicting benefit claim of Lois in October 1978.

The cases cited by Lois Shaff for the proposition that the Government made payments to Luz "at its peril" are clearly

distinguishable from the present facts. In both Dorothy Mae Howell v. U.S., 141 Ct. Cl. 699 (1958) and Concetta F. Stamer v. U.S., 148 Ct. Cl. 482 (1960) the Government had notice of a possible conflicting claims prior to making improper payments. Howell, supra, 141 Ct. Cl. at 706, Stamer, supra, 148 Ct. Cl. at 496. As stated above, the Air Force had no such notice here. Thus, Lois is not entitled to recover from the Air Force the payments made to Luz.

The second remaining matter relates to the proper distribution of SBP payments due under the plan elected by Major Shaff. In his SBP application of May 8, 1973, Major Shaff selected coverage for "my spouse and children." 10 U.S.C. §1447(5) defines "dependent child" as, "the child of a person to whom the Plan applies, including ... [a] recognized natural child who lived with that person in a regular parent-child relationship." This definition, for the

present purposes, is in harmony with California law. See Cal. Civ. Code §4453. Donald's children by Luz are thus his children within the meaning of the SBP statutory scheme.

At present, it is clear that the SBP pension must be paid to Lois pursuant to 10 U.S.C. §1450(a)(1). However, should Lois die, or otherwise become ineligible for the SBP pension, Major Shaff's two sons by Luz, Donald Eduardo and Leo Anthony, will share the SBP benefits equally pursuant to 10 U.S.C. §1450(a)(2).

For the reasons stated, the Dominican divorce decree of Donald E. Shaff and Lois Evelyn Shaff is declared invalid and the Air Force is directed to pay SBP benefits dating from November 1978 to Lois Shaff.

IT IS SO ORDERED.

DATED: October 29, 1981.

/s/ ROBERT P. AGUILAR  
ROBERT P. AGUILAR  
United States District  
Judge

APPENDIX D

JUDGMENT OF THE DISTRICT COURT  
(November 25, 1981)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LOIS EVELYNE SHAFF,	) ORIGINAL
	) FILED
Plaintiff,	) NOV 25 1981
	) WILLIAM L.
vs.	) WHITTAKER
	) Clerk, U.S.
UNITES STATES OF AMERICA,	) DISTRICT COURT
et al.,	) NORTHERN
	) DISTRICT OF
Defendants.	) CALIFORNIA
	)
	) No. C-80-
LUZ ZORAIDA VELANDIA SHAFF,	) 977 RPA
	)
Plaintiff in	) <u>JUDGMENT</u>
Intervention,	)
	)
vs.	)
	)
LOIS EVELYNE SHAFF, et al.,	)
	)
Defendants in	)
Intervention.	)
	)

This matter came regularly on before the Court on motions for summary judgment by plaintiff Lois Evelyn Shaff and plaintiff in intervention, Luz Zoraida Velandia Shaff, motion for partial summary judgment by defendant, Secretary of the Air Force, and motion to dismiss by defendant, Adminis-

trator of Veterans Affairs.

All parties appeared at the hearing on the motions on August 20, 1981, through their respective attorneys.

The motions were fully briefed, argued, and submitted. Plaintiff in intervention filed no opposition to dismissal of the action against the Administrator of Veterans Affairs, and plaintiff did not oppose dismissal without prejudice against the Administrator under certain conditions.

On October 30, 1981, the Court filed its opinion and determined that there was no genuine issue as to any material fact and that plaintiff Lois Evelyne Shaff was entitled to a judgment as a matter of law against the defendants United States of America and Secretary of the Air Force with respect to benefits due and owing under the air Force Survivors Benefit Plan from the date such payments were suspended in October

1978, and is entitled to receive future benefits under the Plan during her lifetime so long as she remains eligible under the Plan. In reaching its decision, the Court determined that the purported divorce decree obtained by Donald E. Shaff in the Dominican Republic was invalid. The Court further determined that the defendant Secretary of the Air Force acted within his discretion in paying benefits under the Plan to plaintiff in intervention until such time as notice of plaintiff's claim of status as Donald E. Shaff's widow was received in October 1978. Thus, plaintiff is not entitled to recover from the United States of America or the Secretary benefits paid to plaintiff in intervention up to the date payment was suspended, to wit: \$1,118.19 in arrearages of Air Force retired pay and \$829.96 in payments under the Survivor Benefit Plan.

ACCORDINGLY, IT IS ORDERED, ADJUDGED

AND DECREED that:

1. The motion for summary judgment of plaintiff in intervention, Luz Zoraida Velandia Shaff, be, and the same is, DENIED; plaintiff in intervention take nothing by her complaint in intervention and that the same be, and hereby is, DISMISSED; and judgment be entered in favor of defendants in intervention, Lois Evelyne shaff, United States of America, Secretary of the Air Force, and against plaintiff in intervention Luz Zoraida Velandia Shaff;

2. The motion for summary judgment of plaintiff Lois Evelyne shaff be, and the same is, GRANTED IN PART and DENIED IN PART, and judgment be entered thereon as follows:

a. The purported divorce obtained by Donald E. Shaff from Lois Evelyne Shaff in the Dominican Republic on March 2, 1973, is declared invalid.

b. Plaintiff Lois Evelyne Shaff is declared to be the surviving spouse and eli-



gible widow of Donald E. Shaff, SSAN 121-09-9338, a deceased retired member of the United States Air Force, and as such is entitled to benefits under the Survivor Benefit Plan from November 1978, during her lifetime so long as she remains eligible for said benefits but is not entitled to benefits paid by the Air Force to Luz Zoraida Velandia Shaff prior to November 1978; thus the defendants United States of America and Secretary of the Air Force are directed to determine the amount of Survivor Benefit Plan benefits due to plaintiff beginning November 1978, to pay her said sum, and to continue to pay benefits under the Plan during her lifetime unless she becomes ineligible for said benefits;

3. The motion for partial summary judgment of defendant Secretary of the Air Force be, and the same is, GRANTED, and judgment be entered thereon;

4. The complaint and complaint in

intervention be, and the same are, DISMISSED WITHOUT PREJUDICE as against the defendant Administrator of Veterans Affairs; and

5. Each party shall bear its own costs.

DATED: November 23, 1981.

/s/ ROBERT P. AGUILAR  
ROBERT P. AGUILAR  
United States District  
Judge

APPENDIX E

SURVIVOR BENEFIT PLAN, 10 USC 1447-1454

TITLE 10, UNITED STATES CODE

SUBCHAPTER II - SURVIVOR BENEFIT PLAN

§1447. Definitions

In this subchapter:

(1) "Plan" means the Survivor Benefit Plan established by this subchapter.

(2) "Base amount" means-

(A) in the case of a person who dies after becoming entitled to retired or retainer pay, the amount of monthly retired or retainer pay to which the person-

(i) was entitled when he became eligible for that pay; or

(ii) later became entitled by being advanced on the retired list, performing active duty or being transferred from the temporary disability retired list to the permanent disability retired list;

(B) in the case of a person who would have become eligible for retired pay un-

der chapter 67 of this title but for the fact that he died before becoming 60 years of age, the amount of monthly retired pay for which the person would have been eligible-

- (i) if he had been 60 years of age on the date of his death, for purposes of an annuity to become effective on the day after his death in accordance with a designation made under section 1448 (e) of this title; or
- (ii) upon becoming 60 years of age (if he had lived to that age), for purposes of an annuity to become effective on the 60th anniversary of his birth in accordance with a designation made under section 1448(e) of this title; or
- (C) any amount which is less than the amount otherwise applicable under clause (A) or (B) with respect to an annuity provided under the Plan but which is not less than \$300 and which is designated by

the person providing the annuity on or before (i) the first day for which he becomes eligible for retired or retainer pay, in the case of a person providing an annuity by virtue of eligibility under section 1448(a)(1)(A) of this title, or (ii) the end of the 90-day period beginning on the date on which he receives the notification required by section 1331(d) of this title that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title, in the case of a person providing an annuity by virtue of eligibility under section 1448(a)(1)(B) of this title.

(3) "Widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay-

(A) was married to him for at least one year immediately before his death; or

(B) is the mother of issue by that marriage.

(4) "Widower" means the surviving husband of a person who, if not married to the person at the time she became eligible for retired or retainer pay-

(A) was married to her for at least one year immediately before her death; or

(B) is the father of issue by that marriage.

(5) "Dependent child" means a person who is-

(A) unmarried;

(B)(i) under 18 years of age; (ii) at least 18, but under 22 years of age and pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, university, or comparable recognized educational institution; or (iii) incapable of supporting himself because of a mental or physical incapacity exist-

ing before his eighteenth birthday or incurred on or after that birthday, but before his twenty-second birthday, while pursuing such a full-time course of study or training; and

(C) the child of a person to whom the Plan applies, including (i) an adopted child, and (ii) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

For the purpose of this clause, a child whose twenty-second birthday occurs before July 1 or after August 31 of a calendar year, and while he is regularly pursuing such a course of study or training, is considered to have become 22 years of age on the first day of July after that birthday. A child who is a student is considered not to have ceased to be a student during an interim between school years if the interim is not more than 150 days and if he shows



to the satisfaction of the Secretary of Defense that he has a bona fide intention of continuing to pursue a course of study or training in the same or a different school during the school semester (or other period into which the school year is divided immediately after the interim. Under this clause, a foster child, to qualify as the dependent child of a person to whom the Plan applies, must, at the time of the death of that person, also reside with, and receive over one half of his support from, that person, and not be cared for under a social agency contract. The temporary absence of a foster child from the residence of that person, while he is a student as described in this clause, will not be considered to affect the residence of such a foster child.

#### **\$1448. Application of Plan**

(a)(1) The program established by this subchapter shall be known as the Survivor

Benefit Plan. The following persons are eligible to participate in the Plan:

(A) persons entitled to retired or retainer pay.

(B) Persons who would be eligible for retired pay under chapter 67 of this title but for the fact that they are under 60 years of age.

(2) The Plan applies-

(A) to a person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he becomes entitled to retired or retainer pay, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay; and

(B) to a person who (i) is eligible to participate in the Plan under paragraph (1)(B), (ii) is married or has a dependent child when he is notified under section 1331(d) of this title that he

has completed the years of service required for eligibility for retired pay under chapter 67 of this title, and (iii) elects to participate in the Plan (and makes a designation under subsection (e)) before the end of the 90-day period beginning on the date he receives such notification.

A person described in subclauses (i) and (ii) of clause (B) who does not elect to participate in the Plan before the end of the 90-day period referred to in such clause shall remain eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A).

(3)(A) If a person who is eligible under paragraph (1)(A) to participate in the Plan and who is married elects not to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child

but not his spouse, that person's spouse shall be notified of that election.

(B) If a person who is eligible under paragraph (1)(B) to participate in the Plan and who is married does not elect to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, that person's spouse shall be notified of that action.

(4)(A) An election under paragraph (2)(A) not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay.

(B) An election under paragraph (2)(B) to participate in the Plan is irrevocable if not revoked before the end of the 90-day period referred to in such paragraph.

(5) A person who is not married when he becomes eligible to participate in the Plan but who later marries or acquires a

dependent child may elect to participate in the Plan, but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries or acquires that dependent child. Such an election may not be revoked. His election is effective as of the first day of the first calendar month following the month in which his election is received by the Secretary concerned. In the case of a person providing an annuity by virtue of eligibility under paragraph (1)(B), such an election shall include a designation under subsection (e).

(b) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person. In the case of a person providing an annuity under this subsection by

virtue of eligibility under subsection (a)(1)(B), such an election shall include a designation under subsection (e).

(c) The application of the Plan to a person whose name is on the temporary disability retired list terminates when his name is removed from that list and he is no longer entitled to retired pay.

(d) If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between

that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

(e) In any case in which a person electing to participate in the Plan is required to make a designation under this subsection, the person making such election shall designate whether, in the event he dies before becoming 60 years of age, the annuity provided shall become effective on the day after the date of his death or on the 60th anniversary of his birth.

§1449. Mental incompetency of member

If a person to whom section 1448 of this title applies is determined to be mentally incompetent by medical officers of the

armed force concerned or of the Veterans' Administration, or by a court of competent jurisdiction, any election described in subsection (a)(2) or (b) of section 1448 of this title may be made on behalf of that person by the Secretary concerned. If the person for whom the Secretary had made an election is later determined to be mentally competent by an authority named in the first sentence, he may, within 180 days after that determination revoke that election. Any deductions made from retired or retainer pay by reason of such an election will not be refunded.

§1450. Payment of annuity: beneficiaries

(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies (or on such other day as he may provide under subsection (j)), a monthly annuity under section 1451 of this title shall be paid to-

(1) the eligible widow or widower;



(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;

(3) the dependent children in equal shares if the person to whom section 1448 of this title applies elected to provide an annuity for dependent children but not for the spouse; or

(4) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies became entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2).

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living or, if the widow

or widower remarries before reaching age 60, until the widow or widower remarries. If the widow or widower remarries before reaching age 60 and that marriage is terminated by death, annulment, or divorce, payment of the annuity will be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow or widower is also entitled to an annuity under this section based upon the marriage so terminated, the widow or widower may not receive both annuities but must elect which to receive.

(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purpose of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(j) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired

or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of the recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower.

(f) An unmarried person who elects to provide an annuity to a person designated by him under subsection (a)(4), but who later marries or acquires a dependent child, may change that election and provide an annuity to his spouse or dependent child. A change of election under this subsection is subject to the rules with respect to execution, revocation, and effectiveness set forth in section 1448(a)(5) of this title.

(g) Except as provided in section 1449 of this title or in subsection (f) of this

section, an election under this section may not be changed or revoked.

(h) Except as provided in section 1451 of this title, an annuity under this section is in addition to any other payment to which a person is entitled under any other provision of law. Such annuity shall be considered as income under laws administered by the Veterans' Administration.

(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process.

(j) An annuity elected by any person providing an annuity by virtue of eligibility under section 1448(a)(1)(B) of this title shall be effective in accordance with the designation made by such person under section 1448(e) of this title.

(k) If a widow or widower whose annuity has been adjusted under subsection (c) subsequently loses entitlement to compensation

under section 411(a) of title 38 because of the remarriage of such widow or widower, and if at the time of such remarriage such widow or widower is 60 years of age or more, the amount of the annuity of such widow or widower shall be readjusted, effective on the effective date of such loss of compensation, to the amount of the annuity which would be in effect with respect to such widow or widower if the adjustment under subsection (c) had never been made, but such readjustment may not be made until the widow or widower repays any amount refunded under subsection (e) by reason of the adjustment under subsection (c).

**§1451. Amount of annuity**

(a)(1) The monthly annuity payable to a widow, widower, or dependent child who is entitled under section 1450(a) of this title to an annuity shall be-

(A) 55 percent of the base amount, as adjusted from time to time under section

1401a of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(A) of this title; or

(B) a lesser percentage (determined by the Secretary of Defense in accordance with subsection (d) of the base amount, as adjusted from time to time under section 1401a of this title on or after the date the person becomes entitled to retired pay under chapter 67 of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(B) of this title.

(2) In the case of a widow who has one dependent child, the monthly annuity shall be reduced by the lesser of (A) an amount equal to the amount of the mother's benefit, if any, to which the widow would be entitled under title II of the Social Security Act (42 U.S.C. 401 et seq.) based solely upon service by the person concerned as described in section 210(1)(1) of such

Act (42 U.S.C. 410(1)(1)) and calculated assuming that the person concerned lived to age 65, or (B) an amount equal to 40 percent of the amount of the monthly annuity as determined under paragraph (1).

(3) When the widow or widower reaches age 62, or there is no longer a dependent child, whichever occurs later, the monthly annuity shall be reduced by the lesser of (A) an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under title II of the Social Security Act (42 U.S.C. 401 et seq.) based solely upon service by the person concerned as described in section 210(1)(1) of such Act (42 U.S.C. 410(1)(1)) and calculated assuming that the person concerned lives to age 65, or (B) an amount equal to 40 percent of the amount of the monthly annuity as determined under paragraph (1). For the purpose of the preceding sentence, a widow or wi-



dower shall not be considered as entitled to a benefit under title II of the Social Security Act (42 U.S.C. 401 et seq.) to the extent that such benefit has been offset by deductions under section 203 of such Act (42 U.S.C. 403) on account of work.

(4) In the computation of any reduction made under paragraph (2) or (3), there shall be excluded any period of service described in section 210 (1)(1) of the Social Security Act (42 U.S.C. 410(1)(1)) which was performed after the effective date of the Uniformed Services Survivor Benefits Amendments of 1980 and which involved periods of service of less than 30 continuous days for which the person concerned is entitled to receive a refund under section 6413(c) of the Internal Revenue Code of 1954 of the social security tax which he had paid.

(b) The monthly annuity payable under

section 1450(a)(4) of this title shall be-

(1) 55 percent of the retired or re-tainer pay of the person who elected to provide that annuity after the reduction in such pay in accordance with section 1452(c) of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(A) of this title; or

(2) a lesser percentage (determined by the Secretary of Defense in accordance with subsection (d)) of the retired pay of the person who elected to provide that annuity after the reduction in such pay in accordance with section 1452(c) of this title, if the annuity is provided by virtue of eligibility under section 1448(a)(1)(B) of this title.

A person who provides an annuity which is determined in accordance with clause (2) and who dies before becoming 60 years of age and is otherwise entitled to retired pay shall be considered to have been en-

titled to retired pay, for the purpose of such clause, at the time of his death, and the retired pay of such person for the purpose of such clause shall be computed on the basis of the rates of basic pay in effect on the date on which the annuity is to become effective in accordance with the designation of such person under section 1448(e) of this title.

(c) Whenever retired or retainer pay is increased under section 1401a of this title, each annuity that is payable under this section or under section 1448(d) of this title shall be increased at the same time by the same total percent. The amount of the increase shall be based on the monthly annuity payable before any reduction under section 1448(d) or 1450(c) of this title or under subsection (a) of this section.

(d) The percentage to be applied by the Secretary of Defense in determining

the amount of an annuity under subsection (a)(1)(B) or (b)(2) shall be 55 percent reduced by such amount as the Secretary shall by regulation prescribe, taking into consideration the age of the person electing to provide the annuity at the time of such election, the difference in age between such person and the beneficiary of the annuity, whether such person provided for the annuity to become effective (in the event he died before becoming 60 years of age) on the day after his death or on the 60th anniversary of his birth, appropriate group annuity tables, and such other factors as the Secretary considers relevant.

**§1452. Reduction in retired or retainer pay**

(a) Except as provided in subsection (b), the retired or retainer pay of a person to whom section 1448 of this title applies who has a spouse, or who has a spouse and a dependent child, and who has not elected

to provide an annuity to a person designated by him under section 1450(a)(4) of this title, or who had elected to provide such an annuity to such a person, but has changed his election in favor of his spouse under section 1450(f) of this title, shall be reduced each month-

(1) by an amount equal to  $2\frac{1}{2}$  percent of the first \$300 of the base amount plus 10 percent of the remainder of the base amount, if the person is providing an annuity by virtue of eligibility under section 1448(a)(1)(A) of this title; or

(2) by an amount prescribed under regulations of the Secretary of Defense, if the person is providing an annuity by virtue of eligibility under section 1448 (a)(1)(B).

As long as there is an eligible spouse and a dependent child, that amount shall be increased by an amount prescribed under re-

gulations of the Secretary of Defense.

The reduction in retired or retainer pay prescribed by the first sentence of this subsection shall not be applicable during any month in which there is no eligible spouse beneficiary.

(b) The retired or retainer pay of a person to whom section 1448 of this title applies who has a dependent child but does not have an eligible spouse, or who has a spouse but has elected to provide an annuity for dependent children only, shall, as long as he has an eligible dependent child, be reduced by an amount prescribed under regulations of the Secretary of Defense.

(c) The retired or retainer pay of a person who has elected to provide an annuity to a person designated by him under section 1450(a)(4) of this title shall be reduced-

(1) in the case of a person providing

the annuity by virtue of eligibility under section 1448(a)(1)(A) of this title, by 10 percent plus 5 percent for each full five years the individual designated is younger than that person; or

(2) in the case of a person providing the annuity by virtue of eligibility under section 1448(a)(1)(B) of this title, by an amount prescribed under regulations of the Secretary of Defense.

However, the total reduction under clause (1) may not exceed 40 percent. The reduction in retired or retainer pay prescribed by this section shall continue during the lifetime of the person designated under section 1450(a)(4) of this title or until the person receiving retired or retainer pay changes his election under section 1450(f) of this title.

(d) If a person who has elected to participate in the Plan has been awarded retired or retainer pay and is not entitled

to that pay for any period, he must deposit in the Treasury the amount that would otherwise have been deducted from his pay for that period, except when he is called or ordered to active duty for a period of more than 30 days.

(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless, in accordance with section 8339(i) of title 5, he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5.

(f) Except as provided in section 1450 (e) of this title, a person is not entitled to any refunds of amounts deducted from retired or retainer pay under this section



unless the amounts were deducted through administrative error.

(g)(1) Notwithstanding any other provision of this subchapter but subject to paragraph (2) and (3), any person who has elected to participate in the Plan and who is suffering from a service-connected disability rated by the Veterans' Administration as totally disabling and has suffered from such disability while so rated for a continuous period of 10 or more years (or, if so rated for a lesser period, has suffered from such disability while so rated for a continuous period of not less than 5 years from the date of such person's last discharge or release from active duty) may discontinue participation in the Plan by submitting to the Secretary concerned a request to discontinue participation in the Plan. Any such person's participation in the Plan shall be discontinued effective on the first day of the first month

following the month in which a request under this paragraph is received by the Secretary concerned. Effective on such date, the Secretary concerned shall discontinue the reduction being made in such person's retired or retainer pay on account of participation in the Plan or, in the case of a person who has been required to make deposits in the Treasury on account of participation in the Plan, such person may discontinue making such deposits effective on such date. Any request under this paragraph to discontinue participation in the Plan shall be in such form and shall contain such information as the Secretary concerned may require by regulation.

(2) A person described in paragraph (1) may not discontinue participation in the Plan under such paragraph without the written consent of the beneficiary or beneficiaries of such person under the Plan.

(3) The Secretary concerned shall furnish promptly to each person who files a request under paragraph (1) to discontinue participation in the Plan a written statement of the advantages of participating in the Plan and the possible disadvantages of discontinuing participation. A person may withdraw a request made under paragraph (1) if it is withdrawn within 30 days after having been submitted to the Secretary concerned.

(4) Upon the death of any person described in paragraph (1) who has discontinued participation in the Plan in accordance with this subsection, any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower.

(5) Any person described in paragraph (1) who has discontinued participation in the Plan may again elect to participate in

the Plan if (A) at any time after having discontinued participation in the Plan the Veterans' Administration reduces such person's service-connected disability rating to less than total, and (B) such person applies to the Secretary concerned, within such period of time after the reduction in such person's service-connected disability rating has been made as the Secretary concerned may prescribe, to again participate in the Plan and includes in such application such information as the Secretary concerned may require. Such person's participation in the Plan under this paragraph is effective beginning on the first day of the month after the month in which the Secretary concerned receives the application for resumption of participation in the Plan, and the Secretary concerned shall begin making reductions in such person's retired or retainer pay, or require such person to make deposits in

the Treasury under subsection (d), as appropriate, effective on such day.

(h) Whenever retired and retainer pay is increased under section 1401a of this title, the amount of the reduction to be made under subsection (a) or (b) in the retired or retainer pay of any person shall be increased at the same time and by the same percentage as such retired or retainer pay is increased under section 1401a of this title.

**§1453. Recovery of annuity erroneously paid**

In addition to other methods of recovery provided by law, the Secretary concerned may authorize the recovery, by deduction from later payments to a person, of any amount erroneously paid to him under this subchapter. However, recovery is not required if, in the judgment of the Secretary concerned and the Comptroller General, there has been no fault by the person to whom the amount was erroneously paid and

recovery would be contrary to the purposes of this subchapter or against equity and good conscience.

#### §1454. Correction of Administrative Deficiencies

The Secretary concerned may, under regulations prescribed under section 1455 of this title, correct or revoke any election under this subchapter when he considers it necessary to correct an administrative error. Except when procured by fraud, a correction or revocation under this section is final and conclusive on all officers of the United States.

#### §1455. Regulations

The President shall prescribe regulations to carry out this subchapter. Those regulations shall, so far as practicable, be uniform for the armed forces, the National Oceanic and Atmospheric Administration, and the Public Health Service. Those regulations shall-

(1) provide that, when the notification referred to in section 1448(a) of this title is required, the member and his spouse shall, before the date the member becomes entitled to retired or retainer pay, be informed of the elections available and the effects of such elections; and

(2) establish procedures for depositing the amounts referred to in section 1452(d) of this title.

APPENDIX F

UNIFORMED SERVICES FORMER SPOUSES'  
PROTECTION ACT - PUBLIC LAW 97-252,  
Title X, 96 STAT. 730 ET SEQ.



UNIFORMED SERVICES FORMER  
SPOUSES' PROTECTION ACT -  
PUBLIC LAW 97-252, Title X,  
96 STAT. 730 ET SEQ. .

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SEC. 1002.(a) Chapter 71 of title 10,  
United States Code is amended by adding  
at the end thereof the following new  
section:

**"§1408. Payment of retired or retainer  
pay in compliance with court orders.**

\* \* \*

"(c)(1) Subject to the limitations of  
this section, a court may treat disposable  
retired or retainer pay payable to a  
member for pay periods beginning after  
June 25, 1981, either as property solely  
of the member or as property of the mem-  
ber or as property of the member and his  
spouse in accordance with the law of the  
jurisdiction of such court."

\* \* \*

Sec. 1003. (a) Section 1447 of title 10, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(6) 'Former spouse' means the surviving former husband or wife of a person who is eligible to participate in the Plan.

"(7) 'Court order' means a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal settlement agreement incident to such previously issued decree).

"(9) 'Final decree' means a decree from which no appeal may be taken or

from which no appeal has been taken within the time allowed for the taking of such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(10) 'Regular on its face', when used in connection with a court order, means a court order that meets the conditions prescribed in section 1408(b)(2) of this title."

(b)(1) Section 1448(a) of such title is amended-

(A) in paragraph (3)(A) by inserting "or elects to provide an annuity under subsection (b)(2) of this section," after "for his spouse,"; and

(B) in paragraph (3)(B) by inserting "or elects to provide an annuity under subsection (b)(2) of this

section," after "for his spouse,".

(2) Section 1448(b) of such title is amended to read as follows; "(b)(1) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person or to provide an annuity to a former spouse.

"(2) A person who is married or has a dependent child may elect to provide an annuity to a former spouse instead of providing an annuity to a spouse or dependent child if the election is made in order to carry out the terms of a written agreement entered into voluntarily with the former spouse (without regard to whether such agreement is included in or approved by a court order).

"(3) In the case of a person electing to provide an annuity under paragraph (1) or (2) of this subsection by virtue of eligi-

bility under subsection (a)(1)(B), the election shall include a designation under subsection (e).

"(4) Any person who elects under paragraph (1) or (2) to provide an annuity to a former spouse shall, at the time of making such election, provide the Secretary concerned with a written statement, in a form to be prescribed by that Secretary, signed by such person and the former spouse setting forth whether the election is being made pursuant to a voluntary written agreement previously entered into by such person as a part of or incident to a proceeding of divorce, dissolution, annulment, or legal separation, and if so, whether such voluntary written agreement has been incorporated in or ratified or approved by a court order."

(c) Section 1450(a)(4) of such title is amended-

(1) by inserting "former spouse or other" before "natural person"; and

(2) by striking out "if there is no eligible beneficiary under clause (1) or clause (2)" and inserting in lieu thereof "unless the election to provide an annuity to the former spouse or other natural person has been changed as provided in subsection (f)".

(d) Section 1450(f) of such title is amended to read as follows:

"f)(1) A person who elects to provide an annuity to a person designated by him under section 1448(b) of this title may, subject to paragraph (2) of this subsection, change that election and provide an annuity to his spouse or dependent child. The Secretary concerned shall notify the former spouse or other natural person previously designated under section 1448(b) of this title of any change of election under the first sentence of this paragraph. Any such change of election is subject to the same rules with respect to execution, revocation,

and effectiveness as are set forth in section 1448(a)(5) of this title.

"(2) A person who, incident to a proceeding of divorce, dissolution, annulment, or legal separation, enters into a voluntary written agreement to elect under section 1448(b) of this title to provide an annuity to a former spouse and who makes an election pursuant to such agreement may not change such election under paragraph (1) unless-

"(A) in a case in which such agreement has been incorporated in or ratified or approved by a court order, the person-

"(i) furnished to the Secretary concerned a certified copy of a court order which is regular on its face and modifies the provisions of all previous court orders relating to the agreement to make such election so as to permit the person to change the election; and

"(ii) certifies to the Secretary concerned that the court order is valid and in effect; or

"(B) in a case in which such agreement has not been incorporated or ratified or approved by a court order, the person-

"(i) furnishes to the Secretary concerned a statement, in such form as the Secretary concerned may prescribe, signed by the former spouse and evidencing the former spouse's agreement to a change in the election under paragraph (1); and

"(ii) certifies to the Secretary concerned that the statement is current and in effect.

"(3) Nothing in this chapter authorizes any court to order any person to elect under section 1448(b) of this title to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to



make such election.".

96 Stat. 736, 737

\* \* \*

Sec. 1006. (a) The amendments made by this title shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title.

\* \* \*

(c) The amendments made by section 1003 of this title shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code, before, on, or after the effective date of such amendments.

96 Stat. 737

\* \* \*

No. 82-1949

Office - Supreme Court, U.S.

FILED

AUG 2 1983

ALEXANDER L. STEVANS

CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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LOIS EVELYNE SHAFF, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE FEDERAL RESPONDENTS**

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REX E. LEE

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*Department of Justice*

*Washington, D.C. 20530*

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Petitioner seeks review of the judgment of the court of appeals awarding benefits under the Survivor Benefit Plan, 10 U.S.C. (& Supp. V) 1447-1455 ("SBP"), to the children of Major Donald Shaff, a deceased officer of the United States Air Force. Petitioner claims that she is the lawful widow of Major Shaff, and therefore is entitled to the benefits.

1. Major Donald Shaff and petitioner were married in 1947 (Pet. App. A3). They did not have any children. In 1967, Donald Shaff left petitioner and, without informing her of his whereabouts, moved to Colombia, South America (*ibid.*). In March 1973, Donald obtained an ex parte divorce from petitioner in the Dominican Republic, and one month later married Luz Zoraida Velandia in Colombia (*id.* at A3-A4). In May 1973, Donald Shaff elected to participate in the SBP, naming as beneficiaries his "wife

and children"; on the election certificate, Donald Shaff identified Luz as his wife (*id.* at A4). Donald and Luz had two sons, Donald Eduardo and Leo Anthony (*ibid.*).

When Donald Shaff died in March 1978, Luz applied for and received benefits under the SBP (Pet. App. A4). In October, 1978, petitioner learned of Donald's death and applied for survivor benefits under the SBP as Donald's legal widow (*ibid.*). The conflicting claims were referred to the Comptroller General for resolution. In a decision issued January 23, 1980, the Comptroller General observed that the marital status of both petitioner and Luz was uncertain due to questions regarding the validity of the Dominican Republic divorce. Accordingly, the Comptroller General concluded that neither petitioner nor Luz could be paid benefits under the SBP, and he referred both parties to a court of competent jurisdiction (*id.* at C4).

2. Petitioner then brought suit against the United States and the Secretary of the Air Force in the United States District Court for the Northern District of California, seeking a declaration that she was entitled to the SBP benefits. She also sought to recoup \$829.96 in SBP benefits paid to Luz before petitioner had asserted her claim as legal widow. Luz intervened in the action. The district court determined that the Dominican Republic divorce was invalid under California law and that petitioner was therefore the legal widow of Donald Shaff (Pet. App. C16). Accordingly, the court ruled (*ibid.*) that petitioner was entitled to SBP benefits under 10 U.S.C. (& Supp. V) 1450(a). The district court also concluded, however, that petitioner was not entitled to recover payments made by the Air Force to Luz before the Air Force was aware of petitioner's claim (Pet. App. C16-C19). The court therefore entered summary judgment in favor of the government for the amount of benefits paid prior to November 1978 (*id.* at D4-D5).

Luz Shaff appealed the district court's judgment. The government did not appeal the grant of summary judgment in favor of petitioner because the government's position with regard to future SBP payments was (and remains) that of a stakeholder, with no interest in the outcome of the dispute between petitioner and Luz (Pet. App. A11 n.1). Petitioner did not appeal the district court's grant of summary judgment in favor of the government with respect to prior SBP payments made to Luz.

The court of appeals agreed with the district court that the Dominican Republic divorce was invalid and that petitioner was Donald's legal widow (Pet. App. A8). The court of appeals also concluded, however, that Donald Shaff had elected to participate in the SBP for the benefit of Luz and their children and not for the benefit of petitioner (*id.* at A9). Accordingly, the court held that petitioner was not entitled to benefits and that under 10 U.S.C. 1450(a)(3) benefits should be paid to the surviving dependent children of Luz and Donald (Pet. App. A10).

3. Petitioner seeks review of the decision of the court of appeals that she is not entitled to benefits under the SBP. Because petitioner did not appeal the district court's order in favor of the federal respondents on the issue of past SBP payments to Luz, that question was not before the court of appeals and is not now before this Court (see Pet. 6 n.3). With regard to the issues raised in the petition, the federal respondents have no direct interest. In accordance with the decision of the Comptroller General, the Air Force will pay SBP benefits to whichever party is ultimately found by the

courts to be entitled to the benefits. No question is presented with respect to which the United States has a programmatic need for review by this Court. Therefore, the federal respondents take no position with respect to whether the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE  
*Solicitor General*

AUGUST 1983